FILED
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JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 660.

FRANCIS SHERWOOD HALE, as Trustee for Gilbert W. Chapin,
Appellant,

against

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS APPEAL.

[redacted]
Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM, 1915, No. 220.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Appellant,

AGAINST

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Appellee.

Motion to Dismiss Appeal.

Comes now the appellee herein by Walker D. Hines, its counsel, and moves the court to dismiss the appeal in the above entitled case, and as ground for this motion states: That the questions involved upon this appeal are moot questions and that the subject matter of the suit out of which this appeal arises cannot be affected by any declaration of this court upon the principles or rules of law which appellant seeks to have decided upon this appeal for the reason that subsequent to the dismissal of the bill herein by the lower court the appellant as plaintiff instituted in the Supreme Court of the State of New York, County of New York, an action upon the same alleged cause of action against the same defendants and

that such action in the Supreme Court of the State of New York was heard and determined and that a final judgment upon the merits therein was rendered dismissing the complaint filed in said action as against this appellee.

This appellee by its counsel aforesaid herewith submits, as part of this motion, the affidavit of A. S. H. Bristow, of New York City, New York, setting forth the facts in respect of said action in the Supreme Court of the State of New York and in respect of the final disposition thereof.

WALKER D. HINES,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin,
Appellant,

AGAINST

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Appellee.

No. 220
October Term
1915.

UNITED STATES OF AMERICA,
Southern District of New York,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

A. S. H. BRISTOW, being duly sworn, deposes and says, that he is and for more than seven years has been a law clerk in the law office of Walker D. Hines, at 52 William Street, New York, and is familiar with all the proceedings in the suit of Francis Sherwood Male, as Trustee for Gilbert W. Chapin, against The Atchison, Topeka and Santa Fe Railway Company and others, the bill in which suit was filed in the District Court of the United States for the Southern District of New York on or about the 12th day of January, 1914, and which was subsequently dismissed by said Court on or about the 23rd day of March, 1914, all of which is set forth in the transcript of record in this Court in Francis Sherwood Male, as Trustee for Gilbert W. Chapin, appellant, against The Atchison, Topeka and Santa Fe Railway Company, No. 220, October Term, 1915; and is also familiar with all the proceedings in the action hereinafter described in the Supreme Court of New York, County of New York.

Affiant also states that on the 1st day of May, 1914, said

Francis Sherwood Male, as Trustee for Gilbert W. Chapin, plaintiff, filed in the Supreme Court, County of New York, against The Atchison, Topeka and Santa Fe Railway Company, Atchison, Topeka and Santa Fe Railroad Company, Atlantic & Pacific Railroad Company, and Boston Safe Deposit & Trust Company, defendants, a complaint entitled as follows :

> Francis Sherwood Male, as Trustee for Gilbert W. Chapin, Plaintiff, against The Atchison, Topeka and Santa Fe Railway Company, Atchison, Topeka and Santa Fe Railroad Company, Atlantic and Pacific Railroad Company and Boston Safe Deposit and Trust Company, Defendants.

That affiant has compared said complaint with the bill of complaint herein and that said complaint in its allegations, prayer for relief and all other respects was in form, arrangement, words and figures identical with and in fact was an exact copy of the bill of complaint filed as aforesaid in said District Court of the United States for the Southern District of New York, excepting only in the following particulars :

(*a*) The introductory words of the bill of complaint in the said District Court of the United States for the Southern District of New York reading as follows : " The plaintiff by this, his bill of complaint, respectfully shows to the Court :" were not contained in the said complaint filed in the Supreme Court, County of New York, and in lieu of said words said last mentioned complaint contained the words : "The complaint, complaining of the defendants, respectfully shows :"

(*b*) The concluding sentence of paragraph designated " First " of the bill of complaint in the said District Court of the United States for the Southern District of New York, reading as follows : " That the plaintiff is a resident and citizen of the State of New York, and an inhabitant and resident of the Southern District thereof " (fol. 5, Transcript of Record,

No. 220), was not contained in paragraph designated "First" of the said complaint filed in the Supreme Court, County of New York.

(*c*) The words "and plaintiff attaches to this bill of complaint and makes a part thereof a copy of said indenture (marked 'A')" in paragraph designated "Third" of the bill of complaint filed in said District Court of the United States for the Southern District of New York (fol. 6, Transcript of Record, No. 220) were not contained in paragraph designated "Third" of said complaint filed in the Supreme Court, County of New York, and in lieu of said words said last mentioned complaint contained the words "alleges that the defendant, Boston Safe Deposit & Trust Company, in and by the said indenture agreed to become and act as Trustee for the owners and holders of said income bonds." A copy of the said indenture (marked "A") was not attached to said complaint filed in the Supreme Court of New York, County of New York.

(*d*) The figures "9,552," found in paragraph designated "Fourteenth" of the bill of complaint filed in said District Court of the United States for the Southern District of New York, were changed in the said complaint filed in the Supreme Court of New York, County of New York, to "9,522."

(*e*) In paragraph designated "Fourteenth" of the bill of complaint filed in said District Court of the United States for the Southern District of New York (fol. 9, Transcript of Record, No. 220), the words "that plaintiff is the assignee or transferee in trust for the benefit of Gilbert W. Chapin, plaintiff's immediate predecessor in title, and the former owner and holder for value of said bonds, and that at the time of such assignment or transfer by said Chapin to plaintiff, he the said Chapin, was and now is a resident, inhabitant and citizen of the State of Connecticut, District of Connecticut, and at that time was and still would be but for the assignment aforesaid, competent to bring this action in the District Court of the United States" were not contained in

paragraph designated "Fourteenth" of said complaint filed in the Supreme Court of New York, County of New York.

That if there should be made in the complaint herein as set forth in the Transcript of the Record herein the changes set forth in the foregoing paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of this affidavit said complaint with such modifications would be identical in all respects with the said complaint so filed in the Supreme Court of the State of New York for New York County.

Affiant further states that said action in the Supreme Court of New York, County of New York, was commenced by the service of the summons and of said complaint on L. C. Deming, Assistant Secretary of the defendant, The Atchison, Topeka and Santa Fe Railway Company; that on or about the 20th day of June, 1914, the defendant, The Atchison, Topeka and Santa Fe Railway Company, filed its demurrer to the said complaint, which demurrer was as follows: "The defendant, The Atchison, Topeka and Santa Fe Railway Company, hereby demurs to the complaint of the plaintiff herein on the ground that said complaint does not state facts sufficient to constitute a cause of action"; that on or about the 30th day of June, 1914, the issue of law arising upon said demurrer to the complaint in said action was, upon motion of the plaintiff, brought on for trial as a contested motion, and the plaintiff then and there moved for judgment upon the pleadings; that on or about the 24th day of September, 1914, a short form order was entered in said action denying plaintiff's motion with ten dollars costs; that on the same day was filed the opinion of Mr. Justice GREENBAUM, in which it was found that the complaint did not state facts sufficient to constitute a cause of action against the said defendant; that on or about the 30th day of September, 1914, application was made by the said defendant to Mr. Justice GREENBAUM for a resettlement of the said short form order, so as to provide for a final judgment against the plaintiff and in favor of said defendant, The Atchison, Topeka and Santa Fe Railway Company, and a

copy of said application was on the same day duly served upon the plaintiff in said action; that on or about the 5th day of October, 1914, the plaintiff submitted to Mr. Justice GREENBAUM, on resettlement of said short form order, an application asking for leave to amend and an affidavit by Howard O. Wood, a member of the firm of Wood, Cooke & Seitz, attorneys for the plaintiff; that on or about the 26th day of October, 1914, Mr. Justice GREENBAUM handed down a decision holding that, upon the papers submitted, no facts had been presented from which the court could say that the complaint was susceptible of amendment to overcome its inherent defects and permitting plaintiff to submit a further affidavit showing additional facts to supply the insufficiencies of the complaint; that on the same day plaintiff submitted to Mr. Justice GREENBAUM the affidavit of William G. Cooke, a member of the firm of Wood, Cooke & Seitz; that on the same day Mr. Justice GREENBAUM handed down a decision holding that the facts sets forth in plaintiff's said affidavits were insufficient to cure the defects of the complaint and denying plaintiff leave to amend; that on the same day was duly entered and filed in the office of the Clerk of the County of New York an order resettling the short form order; that said order resettling the short form order denied the plaintiff's motion for judgment on the pleadings, sustained the demurrer of said defendant, The Atchison, Topeka and Santa Fe Railway Company, dismissed the complaint against said defendant with ten dollars costs and ordered that final judgment be entered accordingly; that thereafter and on or about the 30th day of October, 1914, judgment (a duly certified copy of which is attached hereto as Exhibit "A") was entered in the office of the Clerk of the County of New York upon said order dismissing the complaint as against the defendant, The Atchison, Topeka and Santa Fe Railway Company; that on the 30th day of October, 1914, service of a copy of said judgment and of a written notice of the entry thereof was served upon the

attorneys for the plaintiff; that under the Code of Civil Procedure of the State of New York (§ 1351) no appeal could be taken from said judgment after the expiration of thirty days after the date of said service; that said judgment so entered was never modified, set aside, or appealed from and is now in full force and effect.

Arthur Briston

Sworn to before me this
18th day of January, 1916.

Millard Davis

NOTARY PUBLIC, 17
NEW YORK COUNTY.

(Notorial Seal)

Exhibit A.

SUPREME COURT,

COUNTY OF NEW YORK.

FRANCIS SHERWOOD MALE, as Trustee for Gilbert W. Chapin, Plaintiff, AGAINST THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY, ATLANTIC AND PACIFIC RAILROAD COMPANY and BOSTON SAFE DEPOSIT AND TRUST COMPANY, Defendants.	Final Judgment.

The defendant The Atchison, Topeka and Santa Fe Railway Company having demurred to the complaint herein on the ground that said complaint does not state facts sufficient to constitute a cause of action and the said demurrer having come duly and regularly on to be heard as a contested motion pursuant to the provisions of Section 976 of the Code of Civil Procedure, and the plaintiff having made a motion for judgment on the pleadings herein, and said motions having been duly heard before Hon. SAMUEL GREENBAUM, a justice of this Court, at a Special Term, Part I thereof, and an order having been duly made and entered herein on the 26th day of October, 1914, denying plaintiff's motion for judgment on the pleadings, sustaining said demurrer upon the grounds therein set forth and directing the

entry of final judgment dismissing the complaint as to the defendant The Atchison, Topeka and Santa Fe Railway Company with Ten dollars ($10) costs, and the disbursements of said defendant having been duly adjusted by the Clerk in the sum of Two and $\frac{60}{100}$ dollars ($2.60).

Now, on motion of Walker D. Hines, attorney for the defendant The Atchison, Topeka and Santa Fe Railway Company, it is

ADJUDGED that the complaint of the plaintiff be, and the same is hereby dismissed as against the defendant The Atchison, Topeka and Santa Fe Railway Company, and that said defendant The Atchison, Topeka and Santa Fe Railway Company recover of plaintiff the sum of Ten dollars ($10) costs and Two and $\frac{60}{100}$ dollars ($2.60) disbursements, making in all the sum of Twelve and $\frac{60}{100}$ dollars ($12.60), and that said defendant have execution therefor.

Judgment signed and entered this 30th day of October, 1914.

WM. F. SCHNEIDER,
Clerk.

(County Clerk's Certificate)